

# Texas Family Law Podcast Episode 16: Social Media in Divorce

**Jake:** So , we've been off a couple of weeks. I've been out, my wife gave birth to a child. That's hard doing all the hard work, but it knocked me out of the office for a couple of weeks as well. So we're back at it and I wanted to talk about social media and family law proceedings this week. It comes up quite a bit more and more but it's been a topic for, frankly, since it came, since social media came out.

I remember at the very start of my career using MySpace pages as evidence, and it's just grown since then with the various platforms and ways that you can use social media in trial or in a family law proceedings.

I think the first question that we get from a lot of people on it, and I want your thoughts on it Brian, but just simply is it admissible? Is social media something that can be used in court or in a deposition?

**Brian:** I certainly have found that it is. I think you need to be a little careful if you're going to print something. Make sure that it is the whole, social media posting or whatever, not just, little bits and pieces of it.

There could be an objection if it's not. Make sure it's actually the person, not an alias or something like that, but generally I've found that courts don't have a problem with it.

**Jake:** Yeah, I think that's right. And I think that's a good point on making sure you print the whole thing, and making sure it's that person, even if it's illogical or totally unbelievable if somebody says "that's not my profile."

Sometimes it's a good idea if it's worth it to take a deposition beforehand or send a discovery request, asking somebody that's their social media post. I think there's pros and cons on that. If you don't want them to know that, if it's really that good of a post that you just don't want them to know that, you may want to save it for trial if it's worth the risk of having someone on the witness stand and go all that's not mine and everybody's staring at it going.

Technically it's not authenticated. If the witness says "that's not me or I didn't post that" or the Anthony Wiener excuse, the "Somebody hacked my Twitter account. That's not mine." I think you can deal with that on the fly though in temporary orders because temporary orders are gonna be in front of a judge. You can have your client authenticated. You probably can get it in that way if you take the appropriate steps.

Even if, somebody technically says "that's not me." You have to remember you're in front of a judge. And that judge is going to be thinking "Yeah, just like when Anthony Wiener says my Twitter account is hacked, everybody goes, yeah, we don't believe you." It may not technically come into evidence, but it's certainly going to be used.

But if it's, we're using something for a merit trial, it's something that you really don't want to be struggling with authentication issues in front of a jury or a judge at final trial, take a deposition and ask somebody if this your Facebook post, is this your tweet? Is this your whatever Snapchat or what have you, and then if they deny it then you go about, issue discovery to whatever entity it is.

Brian, I know both of us have sent discovery to Facebook, Twitter, you name it as far as the social media platform, Instagram, to get posts and messages and stuff like that.

Do y'all have a request for social media whenever you send out a request for evidence?

**Brian:** We do. It's usually ignored the first time around at least for a couple different reasons. If you push, I think it's relevant and I think the courts will support you getting into that in a motion to compel.

**Jake:** Yeah, I think that's right. I think we said we do this same thing. I'll send it and you're right it's usually ignored. Frankly, if somebody sends me a request or my clients, all my clients, social media, I usually object and say, you're overly broad. But if you have the request out there and then you know that there's something that you actually can use that is relevant, then since you had the request out there, you can use that as a basis for the motion to compel, rather than have the reissue a really specific discovery on it. It also, for practitioners, it's important to remember if the other side produces their Facebook profile, their Twitter account, their Instagram or whatever, you're under the rules unless they give you otherwise.

It's authenticated, meaning you don't have to prove up through them and try it that this is accurate. This is fair to pick the picture of what the actual post is. You have it authenticated because the other side produced it. People forget that rule and that's an important thing to remember whenever you're dealing with these things at trial.

So it is important to ask for a divorce. So what instances, have you seen it be relevant Brian, and in your cases, custody or divorce, or both?

**Brian:** Both, mostly custody. It's a particular kind of person that gets themselves in trouble on social media. We all know this type of person, oversharing, overly opinionated, no filter, that honestly, and that those things are actually kind of, okay with the right person. But in a person who's angry or vindictive or that type of thing who likes to post a lot, there's going to be some posts that, almost inevitably, are not helpful in a custody case or in a divorce.

The most common ones in the custody situations are demeaning the other parents. The other one that's fairly common that can get somebody in trouble and the custody cases is showing the things they're doing, whether that's an illegal activity or a questionable parenting or lifestyle choice. That can be a problem. I've seen issues in divorces, a couple of different ways. One is, if you're cheating on your spouse, you're probably posting pictures of your new girl. A boyfriend is not a good idea or showing the new trip you took with him to Cabo. not great.

Particularly, if it's a trip you took to them with Cabo, whenever you were supposed to have possession of your kids, then. I've actually a client that did this. I think a few years ago, I had one that said I can't see the kids cause I'm sick and then posted on social media the trip to Cabo with the new girlfriend. Then there's the money or wealth or lifestyle ones of "Oh, I can't pay child support. I'm poor." And then they're running around to expensive places with expensive things. "What valuable diamond necklace are you talking about? I've never owned one." And there's a picture on social media where you're showing it off, that this kind of thing can, they can all be problems.

**Jake:** I think people forget too about this, maybe not forget, but just don't account for it. The direct messaging, Instagram, Facebook, that sort of stuff, where they're sending messages when you're talking about divorce. I think we've caught a lot of people as far as having an affair there and the messages through social media platforms so that there's, it's not showing up on a phone record or emails and stuff like that. It's what you ask for. Emails and texts and everything they say, "I don't have any emails and texts with this paramore."

It turns out they talk on Facebook, they DM each other on Facebook. As the kids say, they slide into each other's DMS on Instagram and, and people forget to ask them that. I think people feel for some reason safer than I've experienced. They say they feel safer messaging through Facebook or social media platforms. I had an opposing party once that wasn't supposed to be talking to the child about the litigation or really about anything under the protective order, and was messaging the child through World of Warcraft. You play the game online, but you could also send it direct messages to other players and so he figured nobody would catch him if he sent messages through World of Warcraft to his 10 year old child, letting him know how awful his mom was and this and that and we got them. That obviously didn't go well for him in court, people are always coming up with interesting ways to try to hide their communication and you gotta stay up to speed on all of it.

**Brian:** That's true. Although most people when I started this private practice family law 25 years ago, it was difficult to prove or show whether there had been an affair or not. It would be a lot of he doesn't come home late at night, that kind of stuff, but there always was some explanation.

But these days I think 98% of the time, if you just have access to their phone records it's going to be real clear. Relationships involve communication, even if that's not the primary motivation, but they always involve some communication. People rarely deny affairs because it's all over their phone. It's their phone records of text messages or emails and if you're really super careful about it, you might lose something like Snapchat or whatever that are, like you said, like the video game type app that you don't think people are going to find, but that is usually not effective if you're digging deep enough and most people know that and they just admit it.

**Jake:** Yeah, I think that's right. I think it's very rare that unless you communicate with each other through smoke signals, it's pretty rare that there's not some type of paper trail. I always tell my war story on social media. I started out my legal career at UT law.

My third year I did a defense against violence clinic and they let students go try cases and little cases here or there that, but I still got assigned to our client, actually, a dad who's a victim of family violence and his mom had taken the kids dropped them off with her parents and they Caldwell County.

Then she moved in with her boyfriend and Williamson County. Wasn't even seeing her kids. She just didn't want the dad to see the kids and wouldn't tell anybody where she was living. We get her on the witness stand, it was 2009, and she got up there and said "No, I live with my parents, with my kids. I don't know what you're talking about. I live in Caldwell County, not my boyfriend's address." And she said, yeah, my driver's license is there, that's where I get my mail. But no, seriously, I live in Caldwell County South of Austin, but she had posted on her MySpace page, back to, if you remember Myspace page, a little profile section and first-line yeah. "Hi I'm so-and-so and and I just moved in with the love of my life, My boyfriend." That really was a nail in the coffin.

Of course my professor at the time had never seen anybody use social media and had never seen any of their students use social media in a divorce in a custody proceeding. So it really was a novel at the time. Now it's just second nature, but that was my sort of first exposure that's. I guess when I try to make myself sound older, I just say I've been doing this ever since my space was around, and use it in court.

We try to keep up. I know in the office, we're always trying to keep up with what the new things are, the way that people communicate and everything like that. Tik Tok in a court. Two months ago, it's actually an issue with the daughter of the parents that was posting stuff on TikTok while in dad's possession.

He knew about it. It was inappropriate stuff. And then he wasn't telling mom about it, wasn't talking to the kids' therapist about it. Yeah, that was a new one for us.

**Brian:** That is a real good one. And that's an interesting one because it. Yeah, it's a very short time you have to put your video on. I think 15, 30, and 60 seconds are your options. So there's a lot of incentives to make a point, do something dramatic in that very short period of time. And, that does encourage people to overdo it or whatever they're good at whatever they're doing to try to make a splash, which in a courtroom made isn't maybe isn't such a good idea.

**Jake:** Yeah. They make for some quick and good exhibits sometimes. I guess the overall theme of it is if you're a practitioner, make sure that you're asking for all this stuff and digging for it. Really looking into this issue, what's out there whenever you're representing a client. Then we always tell our clients the word of caution. Just be careful what you post, everything doesn't delete anything. We don't want you to delete stuff that's out there already.

That's gonna, that's going to create different issues and problems, but be careful about what you post, and as a general rule just in life, keep your account private, particularly if you're going through a divorce or custody case, as that's probably just generally good life advice. If you're, depending on what you're posting on social media.

Even if your account is private, the other side can get it with a good request for production or a subpoena. So just be really careful what you post and, whatever you post, know that it could be an exhibit someday. Some lawyers like me or Brian can be using it and cross-examining you on it. So just be really careful.

So it's always, it's an interesting topic. It's always throwing us something new, but we like to stay on top of it. So I think that covers it.

All right. We'll wrap up this week and we'll stay right next week.

**Brian:** Sounds good.

**Jake:** All right. Bye bye.